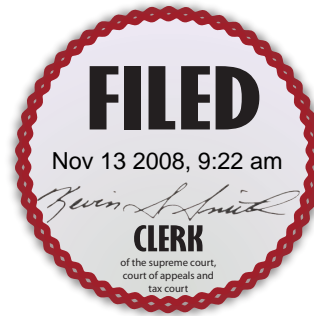


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



APPELLANT PRO SE:

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ATTORNEY FOR APPELLEE:

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**IN THE
COURT OF APPEALS OF INDIANA**

GARY B. PLUNKITT,

Appellant-Defendant,

vs.

FINANCE CENTER FEDERAL CREDIT
UNION,

Appellee-Plaintiff.

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No. 32A01-0801-CV-21

APPEAL FROM THE HENDRICKS CIRCUIT COURT
The Honorable Stephanie LeMay-Luken, Judge
Cause No. 32D05-0707-CC-162

NOVEMBER 13, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Gary B. Plunkitt (“Plunkitt”) appeals the grant of summary judgment in favor of Plaintiff-Appellee Finance Center Federal Credit Union (“Finance”). We affirm.

Plunkitt raises six issues for our review, which we renumber, consolidate, and restate as:

- I. Whether the trial court erred in denying Plunkitt’s summary judgment motion.
- II. Whether the trial court erred in granting Finance’s summary judgment motion.
- III. Whether the trial court’s rulings violated Plunkitt’s right to due process.

On February 27, 2007, Plunkitt executed a “Retail Installment Contract and Security Agreement” (the “Contract”) in the sum of \$43,224.01. As collateral, Plunkitt granted Finance a security interest in his 2007 Ford F-150 Truck (the “truck”).

Plunkitt defaulted on the payments due under the Contract. After the filing of the suit by Finance, Plunkitt voluntarily returned the truck, and Finance sold it at an auction for approximately \$29,000.00. Because the Contract required Plunkitt to pay certain fees, including attorney fees, Finance alleged that he owed \$16,094.91 to Finance after the sale of the truck.

On September 21, 2007, Plunkitt filed a summary judgment motion in which he argued that there was no material fact pertaining to the issue of whether he owed Finance any more money. Specifically, Plunkitt argued that he surrendered a truck worth \$44,500.00 to Finance, thus covering his entire debt. Finance responded that Plunkitt’s

summary judgment motion failed to take a number of costs into account, and it designated evidence to counter Plunkitt's motion. The trial court denied Plunkitt's summary judgment motion, noting that there were still issues of material fact pertaining to the damages suffered by Finance.

On October 15, 2007, Finance filed its counter summary judgment motion with attached affidavit by Kimberly A. Flowers ("Flowers"), Finance's Account Service Manager. Attached to the affidavit were a copy of the sales proceed check from the Auto Auction and a copy of the Contract, neither of which is included in the appellate record. Flowers averred that Plunkitt owed Finance \$16,461.51, with interest accruing at the rate of \$3.90 per day until the date of judgment. Appellant's App. at 76. Also attached to the motion was an "Affidavit in Support of Attorney Fees," in which trial counsel averred that \$2,250.00 was a reasonable fee.

On November 26, 2007, the trial court entered its Findings of Fact and Conclusions of Law in support of its grant of Finance's counter summary judgment motion.¹ In its order, the trial court concluded that there was no "genuine material issue of fact to justify a trial in this matter." Appellant's App. at 99. Plunkitt now appeals.

I.

Plunkitt contends that the trial court erred in denying his summary judgment motion. Citing Ind. Code § 32-35-2-35, Plunkitt argues that the court erred because "the

¹ Although helpful to a court of review, special findings in a summary judgment action are not required and are not binding upon review. *AutoXchange.com v. Dreyer and Reinbold, Inc.*, 816 N.E.2d 40, 48 (Ind. Ct. App. 2004).

established fair market value of the [truck] awarded [Finance] by the court exceeds the amount of the contract complained upon. . . .” Appellant’s Brief at 10.

The purpose of summary judgment is to terminate litigation about which there is no factual dispute and which may be determined as a matter of law. *Ratcliff v. Barnes*, 750 N.E.2d 433, 436 (Ind. Ct. App. 2001), *trans. denied*. When reviewing the grant or denial of summary judgment, this court applies the same standard as the trial court. *Id.* Summary judgment is appropriate only if the designated evidentiary material shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* Generally, construction of a written contract is a question of law for which summary judgment is particularly appropriate. *Merrillville Conservancy District ex rel. Bd. of Directors v. Atlas Excavating, Inc.*, 764 N.E.2d 718, 724 (Ind. Ct. App. 2002).

Ind. Code § 32-35-2-35 is of no assistance to Plunkitt on summary judgment, as the statute applies to the jury’s duty in assessing damages in a replevin action.² Indeed, the statute provides that damages in a replevin action may exceed the value of the property to be returned. In addition, Plunkitt has never denied that the Contract also allows for such damages.

At the time that Plunkitt filed his summary judgment motion, the trial court had not yet been advised of the sale of the truck or the resulting deficiency. Thus, there was a

² The statute provides, “In actions for the recovery of specific personal property, the jury must assess: (1) the value of the property; and (2) the damages for the taking of detention of property; when the jury’s verdict results in a judgment for the recovery or return of the property.”

genuine issue of material fact on the issue of damages, and the trial court correctly denied summary judgment.³

II.

Plunkitt contends that the trial court erred in granting Finance's counter summary judgment motion. Plunkitt argues that the trial court erred because it previously determined that genuine issues of material fact remained when it denied Plunkitt's motion.

With regard to the first of Plunkitt's arguments, we note that Finance designated evidence as part of its counter summary judgment motion, including its "Report of Sale of Collateral and Notice of Deficiency" ("Report"), an "Affidavit in Support of Motion for Summary Judgment" ("Flowers' affidavit"), and an "Affidavit in Support of Attorney Fees" (the "Fees Affidavit"). Appellant's App. at 74-78. Although Plunkitt did move to strike Flowers' affidavit, he did not object to or counter the evidence included in the Report or the Fees Affidavit.

The Report states the following facts: (1) the truck was sold at auction for "a gross sales price of \$29,700.00," subject to expenses totaling \$220.00; (2) Finance received net proceeds of \$29,480.00 from the sale of the truck; (3) Finance incurred additional expenses, as of August 17, 2007, of \$424.50 (attorney fees) and \$40.00 (title fee); (4) Plunkitt, as of August 17, 2007, owed \$45,534.91 under the Contract, including interest, repossession expenses, and attorney fees; and (5) the deduction of the net sales

³ We note that Plunkitt emphasizes the fair market value of the truck. However, he makes no argument that Finance committed a wrongful act in selling the truck at the auction.

proceeds from the Contract obligation equaled \$16,094.91. Appellant's App. at 54-55. The Fee Affidavit, filed on October 16, 2007, with the counter summary judgment motion, stated that a reasonable attorney fee of \$2,250.00 was owed under the Contract.

The trial court concluded that there was no genuine issue of material fact and that the uncontested evidence established that Plunkitt owed Finance \$18,894.81 "plus court costs and interest at the legal rate until paid in full." Appellant's App. at 99. The upshot is that there was designated evidence available at the time the counter summary judgment motion was filed that was not available when Plunkitt filed his summary judgment motion, and this evidence supported the trial court's grant of the counter summary judgment motion.⁴

III.

Plunkitt contends that he was deprived of due process when the trial court granted Finance's motion to vacate a hearing on the sale of the truck. He further contends that the various pre-sale documents filed by Finance should have been treated as a request for summary judgment and that a hearing was required under Indiana Trial Rule 56. The Fourteenth Amendment to the United States Constitution provides that "no person shall be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. XIV. Due process clearly requires a fair opportunity to be heard. *Employee Ben. Managers, Inc. of America v. Indiana Department of Insurance*, 882 N.E.2d 230, 237 (Ind. Ct. App. 2008), *trans. denied*. However, even with regard to constitutional issues,

⁴ Plunkitt also argues that the trial court relied on Flowers' allegedly inadmissible affidavit and also upon certain admissions. Because we have determined that the counter summary judgment motion was supported by other designated evidence, we need not address these arguments.

such as lack of due process, we may find waiver if a party raises an issue for the first time on appeal. *Miller v. Indiana Department of Workplace Development*, 878 N.E.2d 346, 353 (Ind. Ct. App. 2007).

We find no indication that Plunkitt raised these issues below. Thus, he has waived the issues and cannot raise them for the first time on appeal.⁵

Affirmed.

BARNES, J., and BROWN, J., concur.

⁵ Plunkitt notes the Fifth and Fourteenth Amendments in his summary judgment motion. However, he did not make either one of the arguments now presented, but instead argued that there was no genuine issue of material fact on the value of the truck he surrendered to Finance. Furthermore, we note that Plunkitt did not object to the cancellation of the pre-sale hearing.